# On The Government Of The Territories

## The Constitutional Power Of The General Government (1860)


Durbin Ward

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ON THE GOVERNMENT OF THE TERRITORIES.

# THE CONSTITUTIONAL POWER

OF

# THE GENERAL GOVERNMENT

AND

# THE PEOPLE

IN THE

# FEDERAL TERRITORIES.

**BY DURBIN WARD,**
(A DELEGATE FROM OHIO TO THE CHARLESTON AND BALTIMORE CONVENTIONS.)

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# ON THE GOVERNMENT

OF

# THE TERRITORIES.

Since the government of the Federal Territories is now the subject of much debate, it is proper to consider the question, so far as may be, in the light of acknowledged principles. And in what ever respect no such principles can be shown to be applicable, the rule of government must be deduced from such analogies as are furnished by our State and Federal Constitutions.

Whatever may be the theories of speculative publicists, it is an axiom in American political ideas, that all rightful government springs from the consent of the governed. Government is a delegation of power from the only Sovereignty—the People. The people cannot, in the social condition, remain inorganic: this sovereignty, therefore, by a law of inevitable necessity, organizes itself into the State, and delegates to that State certain powers of government. From this organization flows all the powers which civil and political magistrates possess. But Sovereignty is never *surrendered* to the government. Nothing more than a delegation of powers ever is, or, in the nature of things, ever can be made. The people are at liberty to resume these powers and return them to the residuum of undelegated Sovereignty at pleasure. And though this be Revolution it is a right, inalienable as existence, and sacred as humanity. It must result that as the People always retain their inalienable Sovereignty, the State is merely an organic agency, possessing powers such as are delegated to it, and none others.

It does not require a limitation to restrain the powers of government—it requires a delegation to confer them. The very nature of government, as an institution, at least, when considered from an American point of view, circumscribes its authority within the limits of its delegated powers. However it may be subdivided into Legislative, Executive, Administrative, or Judicial, still every function of the government is but an agency—general or special—employed to represent, for the time

being, its principal, the people. In the proper sense, then, government is never Sovereign: it is only Supreme. Supreme as to the political and civil rights and obligations of the individual living under it, but subordinate to the Sovereign People who gave and can take away its power. These are the ideas and principles that are embedded in the Declaration of Independence—that underlie the structure of American Constitutions, State and Federal, and that pervade the whole popular heart of the Union.

Before the Revolution the American people were organized into separate provinces, owing allegiance to the British crown, but not otherwise politically connected with each other. When the War of Independence severed this connection, these provinces became separate States, possessing such attributes as had been delegated to them by the express or tacit consent of the people of each; and such States were not otherwise politically connected than as they were bound together by the Articles of Confederation. These Articles did not blend the inhabitants of the respective States into one AGGREGATED people possessing Sovereignty, but left the people of each State as sovereign as before it was formed.

When the present Federal Constitution was established it sprang from the people of each state, acting through its respective state government. So that the people of each state originated and assented to the Federal compact, not only in their original sovereign capacity, but also through the agency and consent of the state government. In other words, the people of each state, as the residuary and inalienable possessor of original and undelegated sovereignty, and the organic state as the people's depository of specific delegations of sovereign power, each conjointly acceded to the Federal compact. So that the General Government is the offspring of the States and of the people. That government is the creature of the Federal Constitution, and derives all its powers therefrom. Subject always to the people's inherent right of revolution, it is within the limits of that Constitution supreme over States and people; outside of its delegated powers it is totally without authority. Who shall determine what powers have been delegated? This is a question of great difficulty and has not been authoritatively settled in the American mind. If the Federal Government, in any of its departments, has the right to determine the question so as to legally bind the people and the States, then the people and the States are at the mercy of the General Government, if all its departments sustain the encroachments of each other. Eo CONVERSO, if the people and the States have the right to determine the limits of Federal power, then the General Government is at their mercy. Perhaps

there can be no settlement made of this question but by the final arbiter of nations and peoples—force—revolution, if ever a contest of sufficient magnitude shall occur to precipitate this ultimatum of conflicting opinions and passions. But the discussion of this question is not necessary to the consideration of the subject now to be treated of.

The people have established for themselves two forms of Government —State and Federal; and have delegated to each such powers as it possesses. These governments were intended to work harmoniously, and without conflict, and so long as a proper fraternal feeling exists among the people of the several States the National and State power are in no danger of coming into serious collision.

In discussing Federal power in the Territories the first question naturally is, has the Federal government the right to acquire territory? If so, from what clause of the Constitution is that right derived?

If, in the light of the principles already stated, we come to consider the construction to be given the Federal compact, we shall find, in strictness, no such power in the General Government. Or, if such power is to be deduced from the power to admit new states, from the treaty-making, or war-making power, it presents the strange anamoly of the most important powers of government being derived by mere implication from a Constitution which expressly declares that the powers not "delegated" to the General Government are "reserved" to the States or to the people. No constitutional instrument was ever more carefully guarded and its delegations of power more strictly defined. The whole system of territorial acquisition and government is, on strict constitutional principle, a mere Federal usurpation, finding no warrant in the Constitution of the Republic. Human government, however, is a practical agency, and not merely a set of political theorems. When, therefore, under our present Constitution the first necessity (in the case of Louisiana) arose for the acquisition from a foreign government of new territory, America's greatest statesman pointed out this want of authority, and recommended an amendment to the Constitution, conferring the required power. But the necessity for immediate action was great, on account of the unsettled condition of French affairs, and Jefferson, rather than risk the loss of so rich a prize by delay, yielded his constitutional scruples, and the acquisition was made without an amendment to the Constitution. Repeatedly, since, acquisitions of terrritory have been made, and it is now too late, as to those acquisitions, at least, to dispute the power of acquiring territory, Such a power is, it must be admitted, very advantageous to the Republic, and has, perhaps, in every instance been wisely exercised. Let it be

conceded then, for the argument's sake, that the power, though theoretically wanting, practically exists by the unanimous acquiescence of the American people in the Federal assumption of its exercise, and by the numerous treaty relations with foreign governments which have sprung from such assumption.

Territory being acquired, what is the power of the General or State Governments, or of the people in relation to its government? No clear-headed thinker can claim for a moment that the States as such—the States in their corporate capacity—can have any power at all over such territory lying outside of their limits. No State law, or State power extends into the territory of the Federal Union. State laws are bounded by their own limits,, except in cases where they are recognized and enforced by the Federal Constitution, or are recognized and acted upon by the governments of other States, in the spirit of comity between independent States and Nations. Nor can it, with any greater show of reason, be claimed that the citizens of the several States, while remaining in those States, and not being settlers in the Territories, have any constitutional right whatever over the government of the Territories, except as it may be exercised by their agent, the Federal Government. They have no direct power, or direct right; both their power and their right are those only which are delegated to the Federal Government. Neither the States, then, as such, nor the citizens of the States, as such, have any power at all in the Federal Territories. When the General Government acquires terrritory, that Government, and such citizens of the States as settle in the territory have the whole JUS IMPERII therein. The citizen by settlement therein ceases to be a citizen of the State from which he came and becomes a citizen of his new domicile, and not of his old.—Thus the General Government and the citizen, each having entered the territory, the next inquiry relates to their respective rights.

The Federal Government goes into the Territories with whatever powers are delegated to it by the Federal Constitution; and the people go with that residuum of sovereign power retained by them and not delegated to the national government. It is difficult to see how these propositions can be denied. If the General Government can rule the Territories without being controlled by the limitations of the Constitution, it may institute monarchy, establish a religion, withhold the right of trial by jury and the writ of habeas corpus, deprive the citizen of his life, liberty or property without due process of law; in short, inaugurate a complete despotism. It must surely be conceded that any FEDERAL right of government over the Territories is to be within and limited by the Federal

Constitution. That Constitution declares itself to be the "supreme law of the land." Now, it is one of the qualities of a LAW to operate uniformly and equally throughout the jurisdiction of the power ordaining it unless by a special clause it is given a more limited operation. This "supreme law," then, operates uniformly and equally where it operates at all unless otherwise specially provided. It extends over all the States with a uniform and equal operation for it is NOT otherwise provided. And now the question is, does not this "SUPREME LAW" cover the Territories as well as the States? If it does not, no shadow of power is possessed by the General Government over the Territories, for all its power is derived from that Constitution. It cannot, therefore, be successfully denied that the Territories are a part of the "LAND" over which the Constitution is the "supreme law." Hence it must operate uniformly and equal upon the States and Territories of the Federal Union, except as it is taken out of this general operation by some special provision. It cannot confer powers or create limitations upon the General Government in one which it does not create or confer in the other. It cannot be made to contract or expand when its powers are sought to be applied to one part or another of the "land" over which it is the "SUPREME LAW." Whatever the General Government can constitutionally do in a State, subject to the exceptions already mentioned, it may constitutionally do in a Territory: and whatever it cannot do in a State it cannot do in a Territory. Whatever of its powers or restrictions relate to States operate upon States, and whatever of its powers or guarantees relate to the people operate upon the people, whether in a State or in an organized or an unorganized Territory of the Federal Union.

What are the powers of the General Government within the States? No question is or can be raised as to very many of these powers. The General Government evidently has power in a State to survey and sell the public lands, establish post-offices and post-roads, levy taxes and impost duties, establish custom houses, raise armies and navies, constitute courts, define and punish certain crimes, and exercise many other powers. All these it can do in a Territory organized or unorganized, and it can constitutionally do no more, except there be cases as already stated, where the Constitution makes provision therefor. What provisions are there for the government of waste territory, or the people organized upon territory which are not equally applicable to the people of a State? It is indisputable that there is no such EXPRESS provision.

If the Federal Government has a right to acquire territory, if that is one of the "powers vested by the Constitution in the Government," Con-

gress has power "*to make all laws necessary and proper for carrying into execution*" this power of acquisition. Is the right of governing territory a necessary incident to the right of acquiring it? The right of extending *Federal* government over it would seem necessarily to follow; but it would not necessarily follow that the right of local, municipal *State* government would be an inseparable incident to the acquisition. In the first place local municipal government is not one of the objects for which the Federal Government was established. It is by the Constitution left in almost every particular to the authority of the States, respectively. It could hardly be claimed, then, that the acquisition of territory would attach, as a necessary incident, powers the execution of which formed no part of the of the objects for which the government was created; in short, enlarge its powers. Besides, such municpal control can subserve none of the purposes for which territory may be acquired, and can therefore, in no sense be "*necessary*" or "*proper*" incidents to the acquisition of territory. If the territory be a mere wild, unsettled domain, it needs no municipal government until settlers come upon it; and when they do, it is their presence, and not the acquisition, which gives the right of municipal organization and control, if it exists at all. But the territory acquired may already have a municipal organization and local laws, and then surely these mere local, municipal, *non*-federal laws, usages and regulations would not be necessarily abrogated by the treaty of acquisition and the people left without government until Congress should institute laws for them. It is a well settled principle of public law that when an organized people, with laws and usages, are transferred to another government, those laws and usages remain in full force, unless abrogated by the new government under which they are placed, or unless they directly contravene some law of the new sovereign. If we acquire an organized province from a foreign government, its laws and usages are of course subject to the subordinating control of the Constitution and laws of the United States; but in other respects they remain unaltered until some power having municipal sovereignty changes them. We are inquiring whether this "*municipal sovereignty*" can spring necessarily from the mere acquisition of the territory, and we find that if it does, it must do so because it is a necessary and proper incident to the possession and enjoyment of the territory. But we find that the general government has no right to the acquisition itself, or its possession and enjoyment, except for Federal purposes. Its soil may be used for Federal purposes, and its people may be subjected to Federal laws. Beyond that the general government is powerless so

far as any authority derived from this clause is concerned. By the acquisition the *jus proprietatis* in the soil is indisputably in the Federal Government, Whatever power this right of ownership confers legitimately belongs to that government. But this power over the public domain is no greater in an unorganized Territory than in a State. In many of the States the General Government owns lands, but it cannot be claimed that such ownership gives any greater power of government over these States or the people thereof than is possessed in those States where the General Government owns no part of the soil. So it is clear that the mere ownership of the soil gives no right to govern it, whether in State or Territory. From this source then the General Government can derive no right to govern the people of a Territory. The clause authorizing Congress "to make all needful rules and regulations respecting the Territiory" clearly, both from the language and the grammatical construction, refers only to the "Territory" as property, and confers no power of government over the people. Indeed a claim that it does is too ill-founded for serious argument, and is rarely put forth now by any logical thinker who recognizes as correct the doctrine of a strict construction of the Constitution.

There is only one other clause in the Constitution from which the power to govern Territories is ever sought, with any plausibility, to be derived; and that is the clause providing for the admission of new States into the Union. This claim would seem to rest on the assumption that the right to admit a State confers the right to create one in order that it may be admitted Here again we are driven into the illimitable regions of implication, without compass or landmark. It must be admitted, however, that there is no clause in the Constitution from which the power to institute territorial governments by Congress can be so plausibly derived as from this. The admission of a new State is unquestionably a Federal "power," and was one of the original Federal objects contemplated by the framers of the Constitution. It must be conceded too that it is in accordance with the whole genius and spirit of our iustitutions that the Territories shall not be held as perpetual dependencies, but shall ultimately grow into States and be admitted into the Union. It *may* therefore be a necessary exercise of power for Congress to mark out and define such territorial districts as may be of convenient size for the exercise of such federal powers of government as Congress has over the Territory and the people living upon it. And so in defining the boundaries of Territories it may be kept in view that they will ultimately become States of the Union. Such definition of the boundaries of Territories, or inchoate States, is

not an unfair implication from the power to admit new States, inasmuch as the extent of the area of new States may very properly enter into the consideration of their admission. There is no Constitutional guaranty that a State shall be of any particular extent of territory or amount of population, and so these may be considerations entering into the policy of admitting a State into the Union. It might be so large as to preponderate unduly in the Federal Councils, or it might be so small as to check unduly in some Constitutional exigencies the popular will of the larger States. But when the Federal Government has thus, for the exercise of its own present powers over it, and with a view to its future admission as a State defined the boundaries of a Territory, it is difficult, if not impossible, to find any Constitutional authority to go further and dictate the local forms and powers of municipal government for the people of a Territory, any more than the same thing can be done in respect to a State. There is no clause in the Constitution from which it is possible by any fair construction, however liberal, to derive the power of Congress to make local laws for the people of a Territory. Such a power is no where *expressed*, and is by no possibility *necessary* to carry out any power which is conferred upon Congress; for it is clear that no power of internal government over a State, even at the time of admission, can be exercised by Congress, except to require its government to be Republican in form. If the right to organize a territorial government, in order to prepare a new State for admission, is a power incident to the admission of new States, still it would give no municipal power over the territory so organized, for Congress has none over the State to be admitted, and by no correct reasoning could the incident be more potential than the power out of which it springs. It follows, by an inexorable logic, that such power of Congress does not exist. Besides, no power of municipal legislation is given to Congress, except in the District of Columbia and in a few other special instances. "*Expressio unius exclusio alterius.*"

We come to examine the rights of the people in the Territories. The right of self-government is inherent in the people everywhere, and their rights in the local government of the Territories might be placed on that ground, if it rested on no other. But they are not driven to abstract principles in search of their rights. Those rights are expressly recognized and guarantied by the Federal compact. It is declared by the Constitution that "*the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people*," and that "*the powers not delegated to the United States by the Consti-*

*tution, nor prohibited by it to the States, are reserved to the States respectively or to the people.*" The right of municipal government is thus recognized by the organic landmarks of our Republican system as residing in the people as a Sovereign. If they have delegated it to any political organization it rightfully belongs to that organization, otherwise it remains with the people. Such power has clearly never been delegated to the Federal Government over either State or Territory. It follows that by virtue of the Constitution the people who settle in a Territory take with them all the rights recognized and guarantied by the Federal Constitution, and hence as full a right of self-government as they have in the States. Every municipal law and every municipal officer springs from the people and not from Congress. They legally originate their own government. To allow them less power is, on strict Constitutional principle, a Federal assumption of unwarranted authority. True, if Congress has usurped power to make laws and appoint officers for them, and the people acquiesce in the authority of these laws and officers, they may become legitimate by this acquiescence of the people, in the same way that he who removes into a State having its Constitution and laws already enacted is bound to obey them, though he took no part in their formation.

It is often claimed that this principle may be carried much further, and that the acquiesence of the people, since the foundation of the Government, in the assumed power of Congress to institute Territorial Governments, practically confers the power the same as though it had been originally granted by the Constitution—that a construction has been thus given by which the people and the Government are both bound. It may be answered that this is not a Government of precedent but one of Constitutional limitation. And within a few years the Supreme Court of the United States has decided that so important a municipal power as the control of the relation of master and servant in the Territories, though repeatedly exercised from the foundation of the Government, is not within the power of Congress. The repeated exercise of the power was not held to render it legitimate. But if it it were conceded that this long continued exercise of the powers of the Government over the Territories did tend to create a presumption that the people understood that the Constitution conferred such power and intended to acquiesce in it; and if this acquiescence could make it legal, it must be remembered that if the people could be estopped by their long acquiescence to deny the powers claimed and exercised by their Government, still that estoppel must be strictly construed, and cannot be extended by mere implication. Practic-

ally the local concerns of the Territories have been left, in the main, to their own control. Though the power to annul their laws has been claimed, it has scarcely ever been exercised. The right of Congress, therefore, to do so cannot, with justice, be said to have been acquiesced in by the American people. And so it has been with the other local interferences of Congress with the affairs of the Territories. On strict principle there is no power even to institute these governments; but the people needing some organizing hand in their new settlements to give them political form and provide municipal machinery for their infant State, the powers of the General Government—at least after so long an acquiesence of the people—may, perhaps, consistently with the spirit of the Constitution, if not its letter, be exercised for so beneficent a purpose. But this power of organization, if it be conceded to exist, cannot be carried beyond the necessity for it, and is always in subordination to the Constitution. As a practical question it does not therefore matter whether the power to initiate a Territorial organization be exercised by Congress, or spring *sua sponte* from the people; for in either case the people must be left in possession of all the rights guarantied to them by the Constitution, and must subordinate their government to that instrument. It is not intended to be claimed that any municipal law of a Territory, any more than of a State, can contravene the Federal Constitution, or any valid law of Congress. It is only claimed that whatever may be the origin of the laws under which the Territorial organization is effected, when that organization once exists the laws which it Constitutionally enacts have within the Territorial limits the same force and effect as the laws of a State within its limits—no more, no less—and these laws derive their legitimacy from the same source—the People. This is true Popular Sovereignty.

This view of the subject it is admitted is attended with difficulties; and so is every other view that can be taken. This is inevitable, because the Constitution was not established with any reference to the acquiring or governing of Territories. No provision was made on the subject, and the difficulty arises from the necessity of applying the provisions of the Constitution to a subject-matter no where contemplated in the instrument itself. The Ordinance of '87 provided for the government of all the Territory the General Government had when it was formed, and the Constitution contemplated no other. But when Territory is acquired, whether Constitutionally or not, some practical method must be adopted for its government, and none, it is contended, is at all reconcilable to the letter or the spirit of the Constitution except to leave to the people therein, in analogy

to those of the States, the full power of local self-government. Whatever Federal power controls more than this comes of usurpation. The old Ordinance of 1784 is equal to all the wants of the Federal Territories. It is true there are numerous clauses in the Constitution where limitations are imposed upon, or powers reserved, to "States," in which, if the framers of the instrument had contemplated what are now known as Territorial Governments, it is apparent that the word "Territory" would have been coupled with the word "State." Wherever it is apparent that such is the case, by giving the word "State," as it stands in the Constitution, the additional meaning now attached to the word "Territory," (where it is used to signify a temporary government,) every provision of the instrument becomes accordant with the Territorial system here contended for. This cannot be considered as a strained construction when it is remembered that Territorial governments, though not provided for by the Constitution, must still be conformed to it, and reconciled to its provisions; and when it is also remembered that the word "Territory," to signify a government, was entirely unknown when the Constitution was formed. Moreover, the Courts of the United States, in relation to the Fugitive Slave Law, and all other statutes, have already, whenever it was necessary and proper, according to the established rules of construction given the present word "Territory," the meaning of the word "State," so as to give force to the Constitution and laws of the United States within such Territory. The Terrritories, and the people within them, are subject then, like the States and the people within them, to the Federal Constitution, and are entitled to all the privileges and immunities it secures.

The discussion of the power of the General Government over the people of a Territory, and the power of the people of such Territory over their own local laws and institutions, derives its chief importance now from its bearing on the domestic relation of master and slave, as the same is recognized and enforced in the Slave-holding States of the Union, and the assumed right of the people of those States to carry their slaves with them into the Federal Territories and hold them during the existence of Territorial Governments therein. It is claimed by certain statesmen of the Slave-holding States that by virtue of the Constitution of the United States the Federal Territory is the common property of the people of all the States, or, as it is sometimes expressed, the common property of the States. There can be no legal sense in which this claim is true, as stated. As shown already, neither the States, nor the people of the States as such, have any right whatever in the Federal Territories. Whenever

any citizen settles within a Territory he has whatever right belongs to a citizen thereof, but his right is not derived from citizenship of the State from which he came, nor does he carry with him any particular privilege, power or immunity, derived from the State of his former residence. Before he can become a citizen of a Territory he must surrender his citizenship, and consequently his right of citizenship in the State in which he heretofore lived, and so does not carry with him any of the rights appertaining to his former citizenship. The best advised advocates, however, of what are sometimes called "Southern Rights," place their assumed claim on a more plausible ground, and only hold that the people of all the States have an equal right to settle in the Federal Territories—which are common property—carrying with them and holding therein whatever, by the laws of the State from which they came, is recognized as property; and that during the existence of the Territorial Government it cannot prohibit them from so doing. They further claim that whenever it is necessary Congress has the right and is bound to protect them in their claim to introduce and hold slaves against the consent of the legally constituted authorities of the Territory.

This leads to the discussion directly of the power of the people of a Territory, through their Territorial Government, springing, as already claimed, from themselves, and during the Territorial existence, to legislate on the subject of slavery therein. It has already been shown that the *legislative power*, whatever it is over *all* subjects of local, municipal legislation, is vested in the people of the Territories through their legitimately constituted government, and not in Congress. What power of municipal *legislation* exists then over slaves or slavery in the Territories? When the General Government acquires new Territory that Territory may come with or without a local law on the subject. If it should happen that there prevailed no positive law at all upon the subject, as Congress can make none, it would be open to the introduction of slaves, till the Territorial Government should establish some law, and being introduced, they would be slave or free according to the Law of Nations. Some dispute exists among publicists whether in such case the law of Nations would require a positive law to justify and legalize their enslavement. But it is generally conceded that the Law of Nations recognizes slavery as a natural relation, not illegal where no positive law prohibits its existence. But still the nature and extent of the relation, how it shall be enforced, and what are its consequences, are not at all regulated or defined by the Law of Nations, and are always found either in the common law of the

place, or in positive regulations upon the subject. It may perhaps be affirmed as law, that whatever relation the slave bore to the master, or whatever obligation that relation enjoined upon the master, would be recognized and enforced like any other domestic relation, according to the law of the master's original domicile while he was in transitu and not domiciled in another place. But after a new domicilation, his right would cease to be governed by the law of the old domicile. But this is not of much consequence, as the Federal Union is not likely to acquire, as it has never heretofore acquired, any Territory in which no local law on the subject of slavery exists. If Territory be acquired in which at the time of its acquisition slavery is recognized, then, until the Territorial or State Government has altered the law, slavery may be legally introduced. All slaves so legally introduced, or existing there at the time of the acquisition, are subject to the legislative regulations of the Territorial Government as much as if they were in a State. But the Constitution of the United States imposes, among others, one important limitation upon both States and Territories. *Neither can divest the property in slaves.* The introduction of slaves may be prohibited, and the prospective abolition of the slave relation may be provided for in a Territory as in a State. But no man can be deprived of his property without full compensation and due process of law. Any community has a right to prevent the introduction into its midst of any property or any institution which it regards as subversive of the public morals and detrimental to the public good. But it must act in good faith. Having allowed the introduction of that which at the time it chose to treat as property, it cannot afterwards rob the owner of his title on any pretext of subserving the public good, unless it also make him full compensation for his loss.

As the Territorial Government has plenary power upon the subject, if Territory be annexed in which slavery is prohibited by positive law, that law may be repealed by such government, and the right of property in slaves protected and enforced, if the Territorial Government choses so to do. But if no such protection is given, and the old law of prohibition is left in force, then slaves cannot be legally introduced and held in such Territory any more than in any one of the non-slaveholding States of the Union. The right of property in slaves is not derived from the Constitution of the United States. It stands exactly on the basis of any other property, so far as the Constitution is concerned, both in the States and in the Territories. It is, like all property, subject to the municipal regulations of the community where it exists or is sought to be introduced. Whatever regulations the

Territorial Legislature may make in regard to other property may be made in regard to slaves. All the laws relating to the title, estate, descent, conveyance, enjoyment, and so forth, of lands in a Territory, it has always been conceded may be made by the Territorial Government. So the rate of interest on money, the statutes of frauds and perjuries, of wills, the laws of marriage and divorce, laws concerning parent and child: indeed all the mere municipal laws concerning the various relations, contracts and obligations arising in social and civil life and cognizable in the courts, have always been conceded to be within the purview of Territorial regulation. So have the laws relating to mere police and the punishment of crimes and offenses. Has it ever been or can it reasonably be claimed that no law of a Territory could prevent a man from recovering in court the same rate of interest on money allowed by law in the State from which he came? or that he could not be punished for an offense because the same act was not punishable in the State from which he came? So preposterous a claim has never yet been set up. Besides, if slave property did go into the Federal Territories not subject to this Territorial regulation, the absurd result would follow that it would be subject to no regulation at all, or that the slave property coming from each State would in the Territory be governed by the laws of the State from which it came, and the laws of the Territories would be as diverse and contradictory as the laws of the States. On one plantation the slave would be personal property and on another real. One master would be bound to furnish so much food, clothing, and so forth, to his slave, and another a different quality. One family could be separated and sold, and another could not. It is apparent that this cannot be, and that some power of government *over* the Territory must regulate the enjoyment and the incidents of slave property as well as all other property. It must be admitted, however, that if this power be vested in a Territorial Legislature that legislature may refuse to protect slave property, and there is no means of compelling the exercise of this legislative power. No mandamus or writ of procedendo can coerce a legislative assembly. It is apparent then that if a slave owner could legally carry his slave into a Territory, and retain his *property* therein after such Territory had, by its legislature, prohibited slavery, still his slave could be rendered worthless by such prohibition, unless some power outside of the Territorial Government can provide laws to enforce his claim of property, and enable him, by protecting statutes, to enjoy that property. And this consciousness has led to the assertion of the right, on the part of slave holders, to have such laws passed by Congress, if no adequate

protection is afforded by the Territorial Governments, as shall enable them to carry into the Federal Territories and hold therein their slaves, without the consent and against the positive enactments of the Territorial Legislatures. If this right exists it cannot but exist as to every other species of property. This surrenders to the National Congress the complete right of municipal government over the Federal Territories. It has already been shown that no such right exists under the Constitution. Its exercise would be a Federal assumption infinitely more flagrant than any stretch of power attempted in the loosest and darkest days of "Old Federalism;" and in comparison with it all subsequent abuses of Federal power, by bank, tariff, and internal improvement laws, pale into insignificance.

Another claim for this power of intervention has been set up through the medium of the Judicial Tribunals. It is said that the Supreme Court, in the Dred Scott case, having declared slaves to be property, (a proposition never denied by a lawyer,) the Constitution protects property in the Territories. Grant it; but the Constitution does not create property, nor determine what property is. Nor does the Constitution extend more protection to property in the Territories than in the States. If, then, the right of property enables, by virtue of the Constitution, a master to carry his slave into a Territory and be protected against the local law, it equally enables him to carry such slave into a State, and be protected there against the local Constitution or laws of the State; for the Federal Constitution is the "Supreme law of the land," "and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." If the Constitution then enables Congress to protect slaves when carried into a Territory because they are property, it equally enables that body, for the same reason, to protect them when carried into any State. The property in the slave is the creature of some law or legal recognition of the State from which he came, and if this property is protected against the local law of prohibition in one place it must be in another: or else the Constitution has greater force in one part of the "land" over which it is the "supreme law" than in another. But the inference drawn from the Dred Scott case is not justified by the case itself, and it need be referred to no further.

But there is another view of Popular Sovereignty in the Territories equally conclusive. All concede that when the people come to form a State Government they may, at pleasure, exclude or tolerate slavery and regulate all their other local concerns. Whence do they derive their authority at *that* particular

point of time, if they had it not before? It evidently does not come from Congress, for if Congress had, in order to make their action valid, to grant the people power to form a State Government, that would apply to States as well after admission as before. Nor can it come from the Federal Constitution, for that is the mere creature of the States and the people, and confers Sovereignty on no one. How can the Constitution be a barrier prohibiting the people from exercising their sovereign power of self-government up to the moment they ask admission into the Union, and not continue to be a barrier still? If the popular will can revoke the Constitutional inhibition, then why could it not do so before? It cannot be the power of numbers that makes the difference, for Minnesota had two hundred thousand and Florida but fifty thousand people when each formed its State Constitution and came into the Union. Besides, a State is not bound to have a Constitution at all. Its government must be Republican in form, but that form may consist of mere laws, subject to change every year; and the whole powers of government, as well Executive and Judicial as Legislative, may be vested in the General Assembly. Nay, as in Athens, all power may be lodged in the assembly of the whole people, and subject to their alteration at pleasure, Still the government would be Republican, and the State, so far as that is concerned, would be entitled to admission. How can the forming of a Constitution, then, give the State or its people greater municipal power? Or how can admission into the Federal Union confer on a people greater power over their local concerns? It may and does confer power over Federal concerns, but cannot over their own internal affairs. The formation of a State Government is undoubtedly an act of Sovereign power, and as undoubtedly that power does not derive its origin from the Federal Government. The truth is, the people, *sua sponte*, and not from any extrinsic grant of power, may form a government for the inchoate State, or Territory, and by a like exercise of inherent sovereignty they may ask admission into the Federal Union in order to have a Constitutional voice in the control of Federal affairs. If this admission be granted by the other States the Territory then Constitutionally becomes a co-State in the Federal Union. If not granted—and there is no coercive power to compel admission—the Territory remains an *inchoate* State, not in the Union in the Federal sense and to enjoy Federal powers, but still subject to Federal laws and control. But neither admission nor rejection can give Federal power any greater control over the *non*-Federal—the mere State concerns and laws of the people. If it could, the interest of the Federal Government would then

be to increase its power and patronage by keeping the new States permanently in the Territorial condition. But such an interest cannot spring up if the Federal power is no greater before admission than afterwards; and though the possible abuse of a power does not prove that it does not exist, yet where its existence is indisputably doubtful such liability to abuse is a strong argument against its existence.

This doctrine of Congressional intervention is, however, as unsafe as it is unconstitutional. Under the specious name of *protection* control of the whole system may be taken. The measure and the manner of protection is subject to the *discretion* of a legislative body not interested at all in favor of making that protection effective, and in very many instances determined to deny it altogether. And if the protection is refused, what is the remedy? Evidently none. No power of the Government can coerce the legislative arm into action against its will; nor can it control the *discretion* by which that action may be moulded and determined. If the power of protection to slave property in the Territories rests in Congress, it may and probably would regulate the food, clothing, education, marriages, separation, labor, rest, and punishment of slaves, and every other incident of slavery and slave property. The slaveholder better have it prohibited by law at once! The truth is, the only protection slavery ever can or will receive must come from the community in which it exists, and who are interested in it.—Where the people want it, it will be protected; and where they are opposed to it, no power can force it upon them. It will naturally go into, and be protected in, such Territories and such only as are suited to its existence by the habits of the settlers, the character of the soil, climate, productions, and other elements necessary to make it desirable and profitable. It has done so in all time past in this country, and it will do so in the future. In Kansas, where the people did not want slavery, they have prohibited it; and in New Mexico, where they did want it, it has been protected. There let the matter rest.

It must be conceded that the General Government has not acted upon these doctrines of non-intervention in the affairs of the acquired Territories of the Union. Following the example set by the old Confederation, the new Government assumed to institute local governments for the people settled in the new Territories, and in a few instances to govern them with a most arbitrary and despotic sway. The Ordinance of 1787 was made the pattern of all the territorial governments for many years. In some instances Congress allowed slavery to go, or remain in the organized Territories, and in some instances it

was prohibited: and so the power to *veto* the laws of a Territory was continued to be claimed till very lately by the Federal Congress. And even up to the present time, the General Government continues to organize territorial governments, appoint governors and judges, and exercise many other unwarranted powers: though in the language of Gen. Cass, this assumed power is "*a foundling vainly wandering through all the clauses of the Constitution in search of paternity.*" The distinguished Senator from Illinois, however, while Chairman of the Committee on Territories, did much to bring the practice of the Government, in this respect, to a sounder system, although he has not placed it on the principle contended for in this article. When assumptions of power have once become hoary, they are generally regarded as the legitimate offspring of their reputed parentage and are consecrated by the "*odor of sanctity*" hanging round ancient abuses, so long continued and so often repeated. It may be that in this respect the General Government will never be brought down to its naked, constitutional simplicity. And perhaps the most that can be expected is the practical limitation of the Federal power to a mere organization of Territorial Governments, and the remission to the people in the Territories so organized of full power to enact their local laws and to regulate and establish their own local, social, and civil institutions as they choose, "subject only to the Constitution of the United States."

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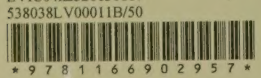


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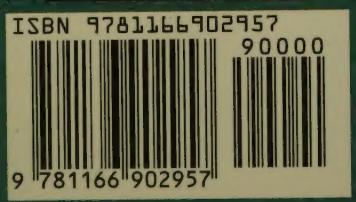


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